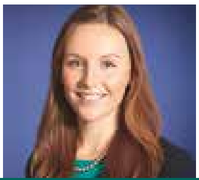
The post-Brexit impact on primary markets



by **Charlotte Bellamy, Ruari Ewing** and **Katie Kelly**

1 How well have primary markets functioned? Have there been any problems for issuers arising from market fragmentation?

Bond issuance volumes in the first part of the year and feedback from ICMA's issuer and underwriter communities suggest that the end of the post-Brexit transition period did not cause significant market disruption or financial instability for primary bond markets. The issuance process has remained largely the same so far, and issuers have not reported any concerns regarding access to funding or investor participation in their bonds.

2 Is there any evidence that bond market activities have shifted from Europe (ie the EU and the UK) to other financial centres (eg New York, Singapore and Hong Kong)?

Feedback from members to date would suggest that activities related to underwriting new issues have shifted more *within* Europe than *from* Europe to other financial centres.

3 To what extent have there been changes in the location in primary market activities?

Market firms took the view that there would not be a significant difference between an EU/UK deal and "no deal" and so have established regulated entities both in the UK and separately within the EU. They have consequently been engaging their clients from the appropriate entities. Location/entity changes for capital and staff may evolve further as the COVID-19 pandemic comes under control and subject to any developments in regulatory direction.

4 Has there been a significant shift in governing law in primary market documentation away from English law to national laws in the EU?

It is still very early to tell whether the end of the post-Brexit transition period will have a significant impact upon the predominant usage of English governing law for international bonds and associated documentation, though it is widely considered that English law is likely to remain the preferred choice of law among UK and EU27 market participants. There does not appear to have been a significant shift so far, though it is understood that in some jurisdictions, particularly in the Nordic region, local regulators are encouraging a move towards using local law for all bonds issued by financial institutions as well as local listings.

There appears to have been an incremental shift in some sectors, most notably capital securities of certain EU financial institution issuers (where the views of local resolution authorities, the SRB and the EBA on the ease of bailing in those securities and their eligibility for TLAC and MREL will be relevant). This incremental shift started before the end of the post-Brexit transition period. There does not appear to have been any shift in the typical use of English governing law for bonds issued by corporate issuers. In addition, it is understood that contractual documentation relating to bonds (for example, subscription agreements) will typically still be governed by English law, even where the bonds themselves (or certain bond provisions) are governed by a local law.

5 Has there been a significant shift in the use of asymmetric non-exclusive jurisdiction clauses?

Members are taking a case-by-case approach to their consideration of any changes to the usual approach in international debt capital markets of using an asymmetric non-exclusive jurisdiction clause in favour of the bondholders and underwriters or dealers. In the unsecured bond market, there does not yet seem to have been a significant change to the *status quo*.

Much will depend on the circumstances of individual cases, in particular the ease of enforcing English law judgments in the jurisdiction of the relevant parties and their assets. It is understood that, while the UK is not a party to the Lugano Convention, an exclusive jurisdiction clause could offer more certainty as to the recognition and enforceability of English law judgments. This is because the UK has acceded to the Hague Convention. However, this certainty would come at the expense of the flexibility that a non-exclusive jurisdiction clause provides. Also, if the UK accedes to the Lugano Convention, then it is understood that the position on civil justice as between the UK, the EU and Switzerland, Iceland and Norway will be almost exactly as it was when the UK was an EU Member State. Therefore, a case-by-case approach seems likely to persist in the unsecured bond market for at least as long as the question regarding the UK's accession to the Lugano Convention remains open. It is anticipated that there will be more clarity on whether the UK will be permitted to accede to the Lugano Convention soon.

6 Has there been a significant shift away from London as a listing venue and, if so, to which jurisdiction(s)?

There is no evidence of a significant shift away from London as a listing venue for Eurobonds.

The most commonly used listing venues for Eurobonds in Europe are the Luxembourg, London and Irish stock exchanges. The lack of change seems likely to be due to a combination of the following factors:

- the international debt capital markets are largely wholesale and institutional investors have historically not expressed any strong preference between listing venues;
- the London Stock Exchange has taken steps to ensure that London-listed bonds can continue to be used for the purposes of ECB eligible collateral; and
- currently, the EU and UK Prospectus Regulations are very similar, so (subject to a small number of exceptions) there is no significant difference between seeking admission to trading on the regulated market in London compared with Luxembourg or Ireland.

It remains to be seen how the fundamental review of the UK Prospectus Regulation proposed by the UK Listing Review and the next review of the EU Prospectus Regulation will have an impact on choice of listing venue.

7 What changes have been needed in ICMA primary market documentation?

At a high level, ICMA's primary market language that catered for EU legislation (eg EU Prospectus Regulation, EU PRIIPs Regulation, EU MiFID II/R product governance regime and EU BRRD Article 55) needed to be replicated and amended to cater for the corresponding UK regimes. This means market participants now often need to include double the amount of regulatory-related language in their bond documents: one set of language for the EU regime and another set of language for the UK regime.

ICMA has made available its updated language to ICMA members and ICMA Primary Market Handbook subscribers on the ICMA Other Primary Market Documentation webpage. In due course, the updated language will be included in the ICMA Primary Market Handbook.

8 What evidence is there of future divergence between capital market regulation in the EU?

In the primary markets, there is evidence of future regulatory divergence in the following areas. The precise implications of any divergence are not yet clear:

- *UK Listing Review:* The UK Listing Review published on 3 March has called for, among other recommendations, a fundamental review of the UK Prospectus Regulation with the aim of moving the UK regime much closer to the regime that existed in the UK before the EU Prospectus Directive and Prospectus Regulation were introduced.
- *EU Prospectus Regulation:* The EU Prospectus Regulation is due to be reviewed by the European Commission by July 2022. This may lead to further divergence between the EU and UK regimes.
- *PRIIPs Regulation:* The UK authorities have indicated that they will not apply the PRIIPs Regulation to UK UCITS, pending a review the UK PRIIPs regime. Similarly, the EU authorities are expected to review the EU PRIIPs Regulation. As things currently stand, they will apply the Regulation to UCITS as from the beginning of 2022. This will lead to divergence between the EU and UK regimes.
- *EU Capital Markets Recovery Package:* The EU Prospectus Regulation and MiFID II/R product governance regimes were amended in February 2021 pursuant to the EU Capital Markets Recovery Package. Following the end of the post-Brexit transition period, these changes have not been automatically carried across to the corresponding UK regimes.
- *EU MAR:* The EU Market Abuse Regulation is due to be reviewed by the European Commission (possibly this year), and this may lead to divergence between the EU and UK regimes.

In relation to benchmarks, the EU BMR was amended on 12 February 2021. The amendments included new provisions related to a statutory override of references to certain benchmarks in certain financial instruments and contracts, designed to cater for an orderly wind-down of LIBOR. The UK is considering changes to the UK BMR as part of the UK Financial Services Bill, also with a view to an orderly wind-down of LIBOR. The UK proposals are different in nature to the EU BMR proposals. For further information, see *Tough Legacy Proposals: A Snapshot*, ICMA, October 2020.

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